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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **KEVIN GUNN,**

Petitioner,

16 v.

17 **J. F. SALAZAR, WARDEN,**

Respondent.

Civil Case No. 08-0972 LAB (WMc)

**NOTICE OF MOTION AND
MOTION TO DISMISS AMENDED
PETITION FOR WRIT OF HABEAS
CORPUS**

Judge: The Hon. William McCurine, Jr.

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**NOTICE OF MOTION AND
MOTION TO DISMISS
AMENDED PETITION FOR
WRIT OF HABEAS CORPUS**

Judge: The Hon. Larry A. Burns

20 TO: PETITIONER KEVIN GUNN, PROCEEDING PRO SE
21

22 PLEASE TAKE NOTICE that Respondent moves the United States District Court,
23 Southern District, to dismiss Petitioner's First Amended Petition for Writ of Habeas Corpus because
24 the Amended Petition is barred by the applicable statute of limitations, and contains two claims
25 (grounds) that have not yet been fairly presented to the State Courts (unexhausted). Petitioner is in
26 the lawful custody of **J. F. SALAZAR, WARDEN**, Chuckawalla Valley State Prison, Blythe,
27 California.

28 ///

1 No hearing on this Motion is required. This Motion is based on this Notice of Motion, the
2 accompanying Memorandum of Points and Authorities, and on the pleadings and state court records
3 that have been or will be lodged with this Court.

4 WHEREFORE, Respondent respectfully requests that the Amended Petition be dismissed.

5 Dated: August 26, 2008

6 Respectfully submitted,

7 EDMUND G. BROWN JR.
Attorney General of the State of California

8 DANE R. GILLETTE
Chief Assistant Attorney General

9 GARY W. SCHONS
Senior Assistant Attorney General

10 KEVIN VIENNA
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11 /s/ James D. Dutton

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: ***Gunn v. Salazar***

Case No.: **08-0972 LAB (WMC)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 26, 2008, I served the following documents: **NOTICE OF MOTION AND MOTION TO DISMISS AMENDED PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Kevin O. Gunn
P-78894
Chuckawalla Valley State Prison
P.O. Box 2289
Blythe, CA 92226
Pro-Per

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

Kevin O. Gunn
P-78894
Chuckawalla Valley State Prison
P.O. Box 2289
Blythe, CA 92226
Pro-Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 26, 2008 at San Diego, California.

L. Chavez
Declarant

Signature

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**MEMORANDUM OF POINTS
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS AMENDED
PETITION FOR WRIT OF HABEAS
CORPUS**

Judge: The Hon. William McCurine, Jr.

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
PROCEDURAL HISTORY	2
FACTUAL BACKGROUND	6
ARGUMENT	
I. THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS PURSUANT TO 28 U.S.C. § 2244 (d) AND THEREFORE SHOULD BE DISMISSED WITH PREJUDICE	12
II. THE PETITION CONTAINS TWO UNEXHAUSTED CLAIMS AND MUST BE DISMISSED	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Cases	
<i>Castille v. Peoples</i> 489 U.S. 346 109 S. Ct. 1056 103 L. Ed. 2d 380 (1989)	16
<i>Anderson v. Harless</i> 459 U.S. 4 103 S. Ct. 276 74 L. Ed. 2d 3 (1982)	16
<i>Biggs v. Duncan</i> 339 F.3d 1045 (9th Cir. 2003)	15
<i>Bonner v. Carrey</i> 425 F.3d 1145 (9th Cir. 2005)	14
<i>Brady v. Maryland</i> 373 U.S. 83 (1963)	2
<i>Coleman v. Thompson</i> 501 U.S. 722, 111 S. Ct. 2546 115 L. Ed. 2d 640 (1991)	17
<i>Cunningham v. California</i> 549 U.S. 270 (2007)	4
<i>Delhomme v. Ramirez</i> 340 F.3d 817 (2003)	15
<i>Gaston v. Palmer</i> 417 F.3d 1030 (9th Cir. 2005)	13, 15
<i>Hasan v. Galaza</i> 254 F.3d 1150 (9th Cir. 2001)	13
<i>Houston v. Lack</i> 487 U.S. 266 108 S. Ct. 2379 101 L. Ed. 2d 245 (1988)	13
<i>In re Robins</i> 18 Cal.4th 770 (1998.)	4, 14
<i>Jackson v. Roe</i> 425 F.3d 654 (9th Cir. 2005)	17

TABLE OF AUTHORITIES (continued)

	Page
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Jefferson v. Budge</i> 419 F.3d 1013 (9th Cir. 2005)	17
<i>Miles v. Prunty</i> 187 F.3d 1104 (9th Cir. 1999)	13
<i>Nino v. Galaza</i> 183 F.3d 1003 (9th Cir. 1999)	14, 15
<i>Pace v. DiGuglielmo</i> 544 U.S. 408 125 S. Ct. 1807 161 L. Ed. 2d 669 (2005)	13-15
<i>People v. Duvall</i> 9 Cal.4th 464 (1995)	4
<i>Rasberry v. Garcia</i> 448 F.3d 1150 (9th Cir. 2006)	15
<i>Rhines v. Weber</i> 544 U.S. 269 125 S. Ct. 1528 161 L. Ed. 2d 440 (2005)	17
<i>Rose v. Lundy</i> 455 U.S. 509 102 S. Ct. 1198 71 L. Ed. 2d 379 (1982)	16, 17
<i>Smith v. Robbins</i> 528 U.S. 259 (2000)	12
<i>Thorston v. Palmer</i> 479 F.3d 643 (9th Cir. 2007)	13, 14
<i>Wixon v. Washington</i> 264 F.3d 894 (9th Cir. 2001)	13
Constitutional Provisions	
Antiterrorism and Effective Death Penalty Act	12, 13
Statutes	
28 United States Code	
§ 2244 (d)	12
§ 2244(d)(1)(A)	13
§ 2244(d)(1)(B)-(D)	12
§ 2244(d)(2)	13-15
§ 2254(b)	16

TABLE OF AUTHORITIES (continued)

1		Page
2		
3	Court Rules	
4	CALJIC	
5	No. 2.92	5, 6
6	California Code of Civil Procedures	
7	§ 237	2
8	Federal Rules Civil Procedure	
9	6(a)	12
10		
11		
12		
13		
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**MEMORANDUM OF POINTS
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS AMENDED
PETITION FOR WRIT OF
HABEAS CORPUS**

The Hon. William McCurine, Jr.

17 **INTRODUCTION**

18 Petitioner Kevin Gunn is currently serving a prison term of 17 years, consisting of 12 years
19 under the "three strikes law" for two robbery convictions and a consecutive five year term for a
20 serious felony prior. By his federal Amended Petition, he challenges both the conviction and the
21 sentence.

22 The Amended Petition is a mixed petition, because two of his seven claims were never
23 presented to the California Supreme Court.
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1 More significantly, the Amended Petition is untimely, the applicable one-year limitations
 2 period has run. Accordingly, Respondent requests that the Amended Petition be dismissed with
 3 prejudice.

4 PROCEDURAL HISTORY

5
 6 Petitioner appealed the judgment, contending that there was insufficient evidence to
 7 support the judgment; trial court erred by excluding evidence of third party culpability; trial court
 8 erred by denying his motion for juror identifying information; and the trial court erred by denying
 9 his motion for a new trial on the bases of *Brady*¹ error, prosecutorial misconduct by presenting false
 10 testimony, and jury misconduct (biased jury). (Lodgment 1 at 1, 10-28.) In case number D035782,
 11 in an unpublished Opinion, the Court of Appeal affirmed the judgment, except for reversing the trial
 12 court order denying Petitioner's motion for disclosure of juror identifying information. (Lodgment
 13 1 at 21, 29.)

14 On February 19, 2002, Petitioner filed a Petition for Review in the California Supreme
 15 Court, case number S104425, which raised two grounds:

16 (1) Insufficiency of the evidence; and

17 (2) Motion for new trial should have been granted on the bases of *Brady* error,
 18 prosecutorial misconduct by introducing false evidence, and jury misconduct.

19 (Lodgment 2 at 6, 21-25.) In an order filed on July 20, 2005, the California Supreme Court denied
 20 the Petition for Review in case number S104425. (Lodgment 3.)

21 Petitioner appealed a post-judgment trial court order denying, in part, his petition for
 22 release of personal juror identifying information after the Court of Appeal had remanded the case
 23 for further proceedings. Petitioner contended that the trial court erred by sustaining the five jurors'
 24 objections, and California Code of Civil Procedures section 237 was unconstitutional as applied by
 25 the trial court. (Lodgment 4 at 1-2.) In case number D041821, in an unpublished Opinion, the Court
 26 of Appeal affirmed the trial court's post-judgment order. (Lodgment 4.)

27
 28 1. *Brady v. Maryland*, 373 U.S. 83 (1963).

1 On June 12, 2004, Petitioner filed a Petition for Review in the California Supreme Court,
 2 case number S125763, on the ground that Petitioner's request for juror information, based only on
 3 the jurors' objections, violated his constitutional rights to a jury trial and due process. (Lodgment
 4 5.) In an order filed on August 11, 2004, the California Supreme Court denied the Petition for
 5 Review in case number S125763. (Lodgment 6.)

6 On November 1, 2005, Petitioner signed a Petition for Writ of Habeas Corpus, which was
 7 filed in California Superior Court, case number HC 18350, on November 4, 2005, and contained the
 8 following grounds:

- 9 (1) Inaccurate assistance of counsel (IAC) - - and failure to object to protocol for
 10 identifying photograph of automobile, failure to call an identity expert, and failure to
 11 investigate a witness who was purportedly being paid to testify;
- 12 (2) Newly discovered evidence/paying a witness to testify in a criminal proceeding;
- 13 (3) Trial court error in sentencing Petitioner to the upper term on count two; and
- 14 (4) IAC for failing to object to restitution amount and failure to request a hearing as to
 15 Petitioner's ability to pay. (Lodgment 7.)

16 On November 23, 2005, the Superior Court, in case number HC 18350, denied the Petition for Writ
 17 of Habeas Corpus. (Lodgment 8.)

18 On December 27, 2005, Petitioner signed a Petition for Writ of Habeas Corpus, which was
 19 filed on December 30, 2005, in the California Court of Appeal, Fourth Appellate District, Division
 20 One, case number D047765, and set forth the same grounds as his Petition for Writ of Habeas
 21 Corpus, filed in the Superior Court on November 4, 2005. (Lodgment 7, 9.) In an order filed on
 22 February 27, 2006, the California court of appeal, in case number D047765, denied the Petition for
 23 Writ of Habeas Corpus. (Lodgment 10.)

24 In a Petition for Writ of Habeas Corpus, received by the California Supreme Court filed
 25 on March 20, 2006, and filed on April 4, 2006, in case number S143209, Petitioner raised the same
 26 grounds as he did in the just referred to Petitions in the Superior Court and the Court of Appeal.
 27 (Lodgments 7, 9, 11.) The California Supreme Court, in an order filed on November 29, 2006,
 28

1 in case number S143209, denied the Petition for Writ of Habeas Corpus, citing *In re Robbins*, 18
2 Cal.4th 770, 780 (1998). (Lodgment 12.)

3 In a Petition for Writ of Habeas Corpus, purportedly mailed by Petitioner on
4 December 12, 2006, and filed by the California Supreme Court on December 18, 2006, in case
5 number S148849, Petitioner raised the same grounds as he did in the just referred to Petition for Writ
6 of Habeas Corpus in the Superior Court, Court of Appeal, and the California Supreme Court.
7 (Lodgments 7, 9, 11, 13.) On April 16, 2007, the Clerk of the Supreme Court, in case number
8 S148849, received Petitioner's Motion for Permission to Amend Petition for Writ of Habeas Corpus,
9 which requested that Petitioner be allowed to amend the Petition to include allegations of violations
10 of certain specified constitutional rights as to each of his claims. (Lodgement 14.) On April 30,
11 2007, the Clerk of the Supreme Court, case number S148849, received Petitioner's Motion for
12 Permission to Amend Petition for Writ of Habeas Corpus, which requested that Petitioner be allowed
13 to amend the Petition with various factual assertions and legal arguments as to grounds one, three,
14 and four of the Petition. (Lodgment 15.) On June 11, 2007, the Clerk of the Supreme Court, in case
15 number S148849, received Petitioner's Permission for Motion to Amend Petition for Writ of Habeas
16 Corpus, which requested that Petitioner be allowed to amend the Petition with legal arguments
17 (focused on *Cunningham v. California*²) as to ground three of the Petition. (Lodgment 16.) On
18 September 27, 2007, the California Supreme Court filed an order denying the Petition for Writ of
19 Habeas Corpus, in case number, S148849, citing *People v. Duvall*, 9 Cal.4th 464, 474 (1995).
20 (Lodgment 17.)

21 On October 4, 2007, Petitioner signed a Petition for Writ of Habeas Corpus, which was
22 filed on October 31, 2007, in the California Superior Court, case number HC 18350, and contained
23 the following grounds:

- 24 (1) Insufficient evidence to support his conviction;
- 25 (2) Trial court denied his constitutional rights by excluding third party culpability
- 26 evidence;

27

28 2. *Cunningham v. California*, 549 U.S. 270 (2007)

(3) Motion for a new trial should have been granted by the trial court because of lack of evidence, failure to timely provide discovery (*Brady* error), false testimony by an police officer, biased juror, prosecutorial misconduct (presenting false testimony), law enforcement misconduct, and jury misconduct;

(4) Trial court erred in denying Petitioner's request for juror information;

(5) Trial court erred, on remand, by violating the Court of Appeal order regarding disclosure of juror information; and

(6) The identification instruction (CALJIC # 2.92) was inadequate and violated Petitioner's constitutional rights. (Lodgment 18.)

On December 18, 2007, the California Superior Court, in case number HC 18350, filed an order denying the Petition for Writ of Habeas Corpus. (Lodgment 19.)

On December 13, 2007, Petitioner signed a Motion to Amend Writ of Habeas Corpus Petition which was filed on December 18, 2007, in the California Superior Court, in case number HC 18350. The motion requested that Petitioner be allowed to amend his Petition to add a claim for ineffective assistance of trial counsel for counsel's failure to bring a motion to strike his serious felony prior. (Lodgment 20.) In case number HC 18350, the Superior Court treated Petitioner's motion as a successive petition for a writ of habeas corpus, and filed an order on February 1, 2008, denying the Petition (motion to amend). (Lodgment 21.)

On May 22, 2008, Petitioner signed the Petition for Writ of Habeas Corpus which was filed with this Court on May 27, 2008. The Petition raised eight claims (grounds), with claims two and four not having been exhausted in state court:

(1) Insufficient evidence to support conviction;

(2) Trial court erred in excluding evidence of third party culpability;

(3) Motion for a new trial should have been granted by the trial court because of the lack of evidence, failure to timely provide discovery (*Brady*), false testimony by a police officer, bias juror, prosecutorial misconduct (presenting false testimony), and law enforcement misconduct;

(4) Trial court erred in denying Petitioner's request for juror's information;

(5) Trial court erred, on remand, by violating the Court of Appeal Order regarding disclosure of juror information;

(6) The identification instruction (CALJIC #2.92) was inadequate and denied Petitioner's constitutional right;

(7) Trial court committed sentencing error in imposing the upper term and the five year serious prior enhancement, in violation of Petitioner's constitutional rights; and

(8) IAC for counsel's failure to object to the protocol for identifying a car in a photograph, failure to put on an identity expert, failure to object to the restitution amount and request a rehearing as to Petitioner's ability to pay, and failing to investigate a claim that a prosecution witness was purportedly paid for his testimony.

On June 6, 2008, this Court ordered the Petition dismissed, without prejudice, on the basis that Petitioner failed to move this Court to proceed in forma pauperis and Petitioner had not alleged exhaustion as to claim six.

On June 19, 2008, Petitioner signed the First Amended Petition for Writ of Habeas Corpus, filed with this Court on June 23, 2008. The Amended Petition asserted seven grounds, with grounds one through five being the same as the respective grounds (one through five) in the original federal Petition filed on May 27, 2008, grounds two and four still being unexhausted. Ground six of the Amended Petition is the same as ground seven in the May 27, 2008, Petition, and ground seven in the Amended Petition is the same as ground eight of the May 27, 2008, Petition.

FACTUAL BACKGROUND^{3/}

The Kamien Robbery

Shortly before 2:00 p.m. on February 24, 1999, Leonard Kamien, age 71, was walking along Adams Avenue when a black man hit him on the back of his neck, knocking him unconscious. Kamien's assailant took his wallet and walked away. David Schroeder and John Burkholder witnessed the attack while they were driving on Adams Avenue. Schroeder dropped off Burkholder

3. Factual Background is taken verbatim from the January 8, 2002, unpublished Court of Appeal Opinion (Lodgment 1 at 2-9). The jury convicted Petitioner of the Paplin and Fortunato robberies, and were unable to reach a verdict (9 to 3 in favor of conviction) on the Kamien robbery.

1 to aid Kamien and then followed the assailant in his truck. As the assailant walked through a
2 backyard, Schroeder told Dennis Loper, who was standing in his yard, to watch the man. Loper
3 watched the man cross his yard. Loper went to his front yard and saw the man drive by in a small,
4 older-model black car. The man pulled the car over to the curb and bent over; as the man drove away
5 he dropped Kamien's wallet out of the car's window. Kamien later found that \$50 was missing from
6 his wallet.

7 At about 2:11 p.m. that day, Gunn, using a money order, paid \$40 of a \$97.06 SDG&E
8 bill at a store on Adams Avenue.^{4/} San Diego Police Officer James Troussel responded to a dispatch
9 regarding the Kamien robbery; the dispatch described the assailant, his clothing, and the car he was
10 driving.^{5/} Troussel saw a car in the area that matched the description and followed it. After the car
11 made a few turns, Troussel stopped it at about 2:15 p.m. for speeding.^{6/} Gunn was driving the car, a
12 Daihatsu, from which Gunn had to get out of the passenger's door because the driver's door did not
13 open. Gunn was wearing a baseball cap and a black and white plaid shirt. Gunn was cooperative,
14 but agitated, and Troussel released him after Burkholder positively excluded Gunn as the assailant.
15 At trial Schroeder testified that he was 90 percent certain that Gunn was the assailant. However,
16 before trial Schroeder did not identify Gunn in a photographic lineup as the assailant and described
17 the assailant as six feet tall and wearing dark clothing, a checkered shirt, and a dark baseball cap. At
18 trial Schroeder identified a ripped plaid Pendleton shirt that police found in Gunn's apartment as the
19 shirt the assailant wore.^{7/}

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22 4. Money orders could be purchased near the store.

23 5. At trial Troussel testified that the dispatch described the assailant as a light skinned black
24 male wearing a baseball cap and a black and white plaid shirt, and driving a black compact car.
25 However, after listening to a tape of the dispatch, Troussel admitted it did not describe the assailant
as light-skinned.

26 6. At trial Troussel testified that the car's driver made a few turns that possibly were evasive.
27 However, neither the tape of his radio communications with the dispatcher nor the police report of
the incident indicated that the driving maneuvers may have been evasive.

28 7. At trial Angela Dearing, Gunn's girlfriend, identified the plaid shirt as Gunn's.

1 Burkholder described the assailant as a very big man who was six feet or taller, but
 2 he did not identify Gunn as the assailant at trial or before trial during curbside and photographic
 3 lineups.^{8/} Loper positively identified Gunn at the preliminary hearing and at trial as the man he saw
 4 walking in his yard and later driving by his house. However, Loper admitted he did not identify Gunn
 5 as that man in a photographic lineup conducted on April 9. Leper had described that man to police
 6 as a very big guy who was about six feet to six feet three inches tall. At trial he could discern no
 7 difference between the shirt found in Gunn's apartment and the shirt that the man in his yard wore.
 8 He also identified Dearing's black car in a photograph as the car that the man drove by his house.^{9/}
 9 Another witness, Vera Brennan, did not identify Gunn as the assailant either in a photographic lineup
 10 or at trial. However, she testified that Gunn's figure was very similar to the assailant's in that he was
 11 very tall and stocky. She had described the assailant to police as a black man who wore warmup
 12 pants, a black shirt, and a hat.

13 *The Pamplin Robbery*

14 At about 10:30 a.m. on March 4, 1999, Carol Pomplin, age 61, was walking along
 15 33rd Street. She believed someone was behind her, felt a blow to the back of her head, and then fell
 16 to the ground. Her purse was yanked off her arm and shoulder as she fell. As her assailant walked
 17 away, Pomplin got up and yelled for help. She saw him put her purse inside his coat. She followed
 18 him to an Arco station where the assailant opened the driver's door of a small, black car from the
 19 passenger's side and then got in the driver's seat. The assailant had difficulty closing the driver's door
 20 and starting the car's engine. Pomplin sought help at the Arco station and a 911 call was made. As
 21 police arrived, the assailant drove away in the car.

22 At trial Pomplin identified Gunn as her assailant. However, she did not identify him
 23 as her assailant in a photographic lineup or at Gunn's preliminary hearing.^{10/} Pomplin described her

24

25 8. At trial Gunn's counsel asserted that Gunn was six feet nine inches tall.

26 9. Although Loper reported to police that "C-2-5" were three consecutive numbers on
 27 the car's license plate number, Dearing's license plate number was "2 WCR 174."

28 10. At trial she testified that she recognized Gunn while she was on the witness stand during
 his preliminary hearing and he turned his face to the left. She was confused as to what she should

1 assailant to police as very tall with dark African-American hands. At trial she identified Dearing's
2 car as the one her assailant drove away.

3 Tim Anderson saw the robbery of Pomplin from across the street. He described the
4 assailant as a light-skinned, very large black man who was taller than six feet one inch. At trial
5 Anderson could not positively identify Gunn as the assailant although he testified that Gunn's
6 physique was similar to the assailant's. He identified Dearing's car as the one the assailant drove away
7 from the Arco station. Anderson testified that before the assailant entered the car, he pointed at
8 Anderson and put his forefinger to his lips, which Anderson believed meant he should not say
9 anything.

10 Rosemary Andaya, the Arco station manager, testified at trial that she saw a very large
11 black man get in a small black car and have trouble with the driver's door and starting the car's engine.
12 Andaya stated that Dearing's car was similar to the one she saw at the station, but she was not positive
13 it was the same car. She described the man as over six feet tall, weighing about 250 pounds and
14 having a dark complexion. She did not identify Gunn as that man either at trial or in the photographic
15 lineup.

16 *The Fortunato Robbery*

17 Between noon and 12:30 p.m. on April 6, 1999, Rosetta Fortunato was placing
18 groceries in the trunk of her car, which was parked in a dental building parking lot. Fortunato saw
19 a person coming toward her and was struck on the back of her head. She became unconscious
20 momentarily. After regaining consciousness, Fortunato saw her assailant crossing the street with her
21 purse.

22 Fortunato testified that she saw her assailant's face before the attack and positively
23 identified Gunn as her assailant at the preliminary hearing and at trial. When shown a photograph
24 of a checkered shirt found in Gunn's apartment, she identified it as the shirt her assailant wore.

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28 do and after her preliminary hearing testimony she told a detective in the hallway that she had
recognized Gunn as her assailant.

1 During a photographic lineup she stated that Gunn and another person looked like the man who
2 attacked her.^{11/} She told police that her assailant was taller than six feet.

3 Donald Stowell saw a man walking toward the dental building parking lot about 15
4 seconds before he heard a woman scream. Stowell testified that Gunn was identical or similar to the
5 man he saw. He selected Gunn in a photographic lineup as that man. He described the man to police
6 as being very tall--about six feet four inches--and wearing a baseball cap and a jacket. John Halloran
7 was across the street from the dental building parking lot when he heard screaming. Halloran saw
8 a man walk out from behind the dental building and then walk west on El Cajon Boulevard. The man
9 looked over his shoulder several times as he crossed the street. Halloran selected Gunn in a
10 photographic lineup as the person who most closely resembled that man. Halloran did not identify
11 Gunn as the man at the preliminary hearing. At trial he could not positively identify Gunn as that
12 man, but stated that Gunn had a similar height and build as that man. Halloran testified that the man
13 wore a checkered Pendleton shirt that was similar to a shirt found in Gunn's apartment. He described
14 the man to police as black and between six feet three inches and six feet four inches tall and wearing
15 a black and white checkered shirt.

16 Steve Doepker was standing in the parking lot of the Quik Mart convenience store on
17 El Cajon Boulevard when he heard screams coming from behind the dental building. He saw a man
18 come from behind that building, walk down the street, walk across the street and past him, and go into
19 an alley behind the Quik Mart. Doepker selected Gunn in a photographic lineup as that man. At trial
20 Doepker identified Gunn as that man. He testified that the man wore a checkered Pendleton shirt that
21 was similar to a shirt found in Gunn's apartment.

22 At about 12:30 p.m. that day, taxi cab driver Jackie Robertson was dispatched to the
23 Quik Mart to pick up a passenger. As he approached the store's front entrance, there were police
24 helicopters overhead and police cars driving up and down the street. Gunn quickly came out of the
25 store and got into the cab. Gunn was fidgety and did not give Robertson a destination address. Gunn
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28 11. She thought the other person looked more like her attacker because he had more
hair than Gunn.

1 slumped down in his seat and immediately removed his checkered, black Pendleton shirt. Robertson
2 testified that shirt was similar to a shirt found in Gunn's apartment. Gunn directed Robertson to drive
3 south on 35th Street across El Cajon Boulevard, turn left one block later on Orange Street, proceed
4 one block past Wilson Avenue, and then turn left into an alley behind Wilson Avenue. Robertson
5 drove up the alley in back of North Park Produce (which was near the dental building parking lot) and
6 dropped Gunn off in the alley at the security gate of an apartment complex at 4269 Wilson Avenue.
7 Robertson selected Gunn in a photographic lineup as that man and positively identified Gunn as that
8 man at the preliminary hearing and at trial.

9 A surveillance videotape from the Quik Mart showed Gunn entering the store and
10 asking for a cab. Helicopter noise could be heard in the background. When someone asked Gunn
11 what was going on outside, Gunn replied that "there is a man with a gun across the street." Dearing
12 viewed the videotape at trial and identified Gunn as the man shown on the tape wearing a plaid shirt
13 and hat.

14 Police found Fortunato's purse hidden inside a wheel of a car parked off the alley
15 behind the Quik Mart. Her credit cards and checkbook were found in a dumpster farther down the
16 alley. Police conducted surveillance of Gunn from April 9 through April 16, but terminated their
17 surveillance because Gunn apparently was aware of it.

18 *The Defense Case*

19 Dearing testified that she was Gunn's girlfriend. She owned a black Daihatsu with
20 a damaged driver's door that was inoperative during February 1999. Gunn occasionally drove her car
21 during that period. Dearing lived with Gunn at their Wilson Avenue apartment from July 1998 until
22 February 24, 1999, when she moved out to stay with her mother. She moved back in with Gunn in
23 mid-March 1999. She testified that on March 4, 1999, she drove her car to work and records showed
24 she worked 13 1/2 hours that day. She did not allow Gunn to drive her car during the period she lived
25 with her mother. She testified that Gunn did not work during February, March, or April 1999, except
26 for occasional part-time jobs. Their Wilson Avenue apartment was about a five minute walk from the
27 Quik Mart store. She was convicted of welfare fraud felonies in 1994 and 1996.

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1 Gloria Dearing, Dearing's mother, testified that Dearing lived with her for two and
2 one-half to three weeks in late February 1999. During that period, Dearing drove her car to work.

3 ARGUMENT

4 I.

5 THE PETITION IS BARRED BY THE STATUTE OF 6 LIMITATIONS PURSUANT TO 28 U.S.C. § 2244(d) AND 7 THEREFORE SHOULD BE DISMISSED WITH PREJUDICE

8 Because the present Petition was filed after April 26, 1996, it is governed by the
9 Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Smith v. Robbins*, 528 U.S. 259, 68 n.3,
10 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). As amended by AEDPA, 28 U.S.C. § 2244(d) now
11 provides for a limitations period of one year.^{12/}

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16 12. The statute provides as follows:

17 (1) A 1-year period of limitation shall apply to an application for a writ of
18 habeas corpus by a person in custody pursuant to the judgment of a State court. The
19 limitation period shall run from the latest of -

20 (A) the date on which the judgment became final by the
21 conclusion of direct review or the expiration of the time for seeking
22 such review;

23 (B) the date on which the impediment to filing an application
24 created by the State action in violation of the Constitution or laws of
25 the United States is removed, if the applicant was prevented from
26 filing by such State action;

27 (C) the date on which the constitutional right asserted was
28 initially recognized by the Supreme Court, if the right has been newly
29 recognized by the Supreme Court and made retroactively applicable
30 to cases on collateral review; or

(D) the date on which the factual predicate of the claim or
claims presented could have been discovered through the exercise of
due diligence.

(2) The time during which a properly filed application for State post-
conviction or other collateral review with respect to the pertinent judgment or claim
is pending shall not be counted toward any period of limitation under this subsection.

1 Normally, the statute of limitations begins to run on the day following finality of
 2 judgment, Fed. R. Civ. P. 6(a), unless one of three exceptions apply. 28 U.S.C. § 2244(d)(1)(B)-(D).
 3 None of the exceptions applies to Petitioner: there was no state impediment to his seeking further
 4 relief; his claims do not rely on any new constitutional right determined by the United States Supreme
 5 Court to be retroactive; and the factual predicate for his current claims was known by the time his
 6 conviction was final.^{13/}

7 Here, Petitioner filed his second and last Petition for Review in the California Supreme
 8 Court on June 12, 2004, case number S125763. (Lodgment 5.) The Supreme Court denied his
 9 Petition for Review in case number S125763 on August 11, 2004. (Lodgment 6.) Where no Petition
 10 for Certiorari is filed with the United States Supreme Court, the State Court judgment becomes final
 11 90 days after the California Supreme Court denies the Petition for Review. *Wixon v. Washington*, 264
 12 F.3d 894, 897 (9th Cir. 2001); *Bowen v. Roe*, 188 F.3d 1157, 1158 (9th Cir. 1999); 28 U.S.C. §
 13 2244(d)(1)(A). Accordingly, Petitioner's one-year statute of limitations commenced on November 10,
 14 2004.

15 A Petitioner is entitled to statutory tolling for the period of time during which a
 16 properly filed application for post conviction relief is pending in a state court. 28 U.S.C. §
 17 2244(d)(2). A Petitioner has the burden of demonstrating facts supporting tolling. *See Pace v.*
 18 *DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); *Gaston v. Palmer*, 417 F.3d
 19 1030, 1034 (9th Cir. 2005) (as amended). Absent tolling, Petitioner must seek Habeas Corpus relief
 20 within one-year and one-day after his state court conviction is deemed final. *Thorston v. Palmer*, 479
 21 F.3d 643, 645 (9th Cir. 2007).

26 13. The operative knowledge is of the important facts, not their legal significance. *Hasan*
 27 *v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Petitioner knew the facts underlying his
 28 conviction, his sentence and of his counsel's representation before the expiration of the time in
 which he could have filed a Petition for Certiorari with the United States Supreme Court.

1 Petitioner signed his first state Petition for Writ of Habeas Corpus on November 1,
 2 2005,^{14/} and it was filed in Superior Court case number HC 18350 on November 4, 2005. (Lodgment
 3 7.) Thus, even using the earliest possible date, being the constructive filing date of November 1,
 4 2005, a period of 355 days transpired, without tolling, before Petitioner's first petition, leaving only
 5 ten days of the one-year limitation period. *See Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).

6 A petition is not properly filed for purposes of 28 U.S.C. section 2244(d)(2) where the
 7 state court denies the petition for being "untimely." *Pace*, 544 U.S. at 410, 417; *Bonner v. Carrey*,
 8 425 F.3d 1145, 1149 (9th Cir. 2005). Where the petition is deemed "untimely," the limitation period
 9 is not tolled, and thus continues to run, between state court order as to the petition proceeding the
 10 petition which was deemed "untimely" and the order of "untimeliness" by the state court on the
 11 successive petition. *See Thorston*, 479 F.3d at 646; *Bonner*, 425 F.3d at 1149.

12 Here, the California Court of Appeal denied a petition in case number D047765 on
 13 February 27, 2006. (Lodgment 10.) In regards to the successive petition filed in the California
 14 Supreme Court, in case number S142309, the Supreme Court denied the petition on November 29,
 15 2006, citing "*In re Robbins* (1980) 18 Cal.4th 770, 780." (Lodgment 12.) The *Robbins* citation by
 16 the California Supreme Court constitutes a clear ruling that the petition in case number S142309 was
 17 "untimely." *Thorston*, 479 F.3d at 645. Accordingly, the statute of limitations period was not tolled
 18 for another 277 days, from the February 27, 2006, Court of Appeal order, until the November 29,
 19 2006, California Supreme Court "untimeliness" order. Thus, the one-year limitation period for filing
 20 a federal petition had expired by 266 days as of November 29, 2006.

21 Additionally, there is no tolling between the November 29, 2006, Supreme Court order
 22 in case number S142309, and the second petition in the California Supreme Court, mailed on
 23 December 12, 2006, and filed by the court on December 18, 2006, in case number S148849.
 24 (Lodgment 13.) *See Thorston*, 479 F.3d at 646; 28 U.S.C. § 2244(d)(2). Accordingly, based on

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 26 14. Under the mailbox rule of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed.
 27 2d 245 (1988), an incarcerated pro se prisoner's pleading is deemed filed at the moment of delivery
 28 to prison officials. This mailbox rule has been extended to both state and federal habeas corpus
 petitions for purposes of applying the AEDPA statute of limitations. *See Miles v. Prunty*, 187 F.3d
 1104, 1106 n.2 (9th Cir. 1999).

1 Petitioner's "constructive" filing date of December 12, 2006, as to his petition in case number
2 S148849, another 12 days of the limitation period had run from November 30, 2006, to the date of
3 mailing, December 12, 2006.

4 The California Supreme Court denied the petition in case number S1448849 on
5 September 25, 2007 (Lodgment 17), and Petitioner commenced a new round of state habeas petitions
6 by filing a petition in the Superior Court on October 13, 2006, which was purportedly signed on
7 October 4, 2007. (Lodgment 18.) Using October 4, 2007, as the constructive filing date, there was
8 no tolling of the limitation period between September 25, 2007, and October 3, 2007, another eight
9 days. *See Biggs v. Duncan*, 339 F.3d 1045, 1047-48 (9th Cir. 2003) [tolling does not apply to the
10 time periods between Petitioner's, where the successive petition is not progressing to the next higher
11 state court level]. Finally, Petitioner's last petition in state court was disposed of on February 1, 2008,
12 when the Superior Court denied his last successive petition. (Lodgment 21.)

13 Petitioner's first federal petition was filed on May 27, 2008, and purportedly signed
14 on May 22, 2008. Using the constructive filing date of May 22, 2008, for the federal petition,
15 additional 110 days was "used," between February 1, 2008, and May 22, 2008, for purposes of the
16 statute of limitations. *See Delhomme v. Ramirez*, 340 F.3d 817, 821 (2003) [limitations time period
17 runs from the disposition of the last pending state petition until the filing of the federal petition];
18 *Nino*, 183 F.3d at 1006-07; 28 U.S.C. § 2244(d)(2).

19 Thus, in aggregation, Petitioner "used" 762 days between the date that his judgment
20 became final in state court and the constructive filing of his federal petition. Thus, his one-year
21 limitation had long expired before his first federal petition.

22 Petitioner has made no claim for equitable tolling, and no basis is apparent for such
23 tolling.

24 Although the United States Supreme Court has never sanctioned equitable tolling in
25 § 2254 cases, the Ninth Circuit has recognized that it may apply in rare cases. But before equitable
26 tolling may be considered, a petitioner must establish two elements "(1) that he has been pursuing his
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rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) (quoting *Pace v. DiGuglielmo*, 544 U.S. at 408); *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005).

It is clear from the procedural history that Petitioner has not been diligent. Following California Supreme Court’s denial of his second Petition for Review on August 11, 2004, and taking into account the 90 days in which Petitioner could have filed a petition for writ of certiorari, Petitioner never sought any relief until he filed his first state habeas corpus petition on November 1, 2005, almost a year later.

In addition, after the California Supreme Court denied his last state habeas corpus petition on February 1, 2007, Petitioner waited for close to four months, until May 20, 2008, before signing his initial federal petition.

Petitioner’s lack of diligence precludes equitable tolling, and the Petition should be dismissed as untimely.

II.

THE PETITION CONTAINS TWO UNEXHAUSTED CLAIMS AND MUST BE DISMISSED

In ground two of the current Amended Petition’s seven grounds for relief, Petitioner complains that the trial court erred by excluding evidence of third party culpability evidence. (Amended Pet. at 10-14.) In ground four of the Amended Petition, Petitioner complains that the trial court erred in refusing his request for jury information (prior to first appeal). (Amended Pet. at 23-25.) However, in Petitioner’s multiple presentations of claims to the California Supreme Court, he did not raise grounds two and four of his federal Amended Petition. (Lodgments 2, 5, 11, 13.)

Because the claims in grounds two and four have never been presented to the state’s highest court, these claims are unexhausted. A federal court may not grant federal habeas corpus relief unless the petitioner has exhausted his state court remedies with respect to all claims contained in the petition. 28 U.S.C. § 2254(b); *Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Rose v. Lundy*, 455 U.S. 509, 150, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

1 In order to exhaust state court remedies, the federal contention must have been fairly presented to
 2 the state's highest court, which in turn must have disposed of the claim on the merits. *Anderson*
 3 *v. Harless*, 459 U.S. 4, 6-8, 103 S. Ct. 276, 74 L. Ed. 2d 3 (1982).

4 Here, because two claims are unexhausted, the Amended Petition presents both
 5 exhausted and unexhausted claims. A federal court cannot entertain a petition that includes both
 6 exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. at 510. Petitioner has the option of
 7 amending the petition again to delete the unexhausted claims, or he may accept dismissal, without
 8 prejudice, to pursue the unexhausted claims in state court, or he may ask this Court to stay his current
 9 Amended Petition while he seeks to exhaust. *Id.*; see also *Jackson v. Roe*, 425 F.3d 654 (9th Cir.
 10 2005) (federal court may stay mixed petitions); *Jefferson v. Budge*, 419 F.3d 1013 (9th Cir. 2005)
 11 [district court must advise a Petitioner of the choices available under *Rose v. Lundy*].

12 Petitioner can attempt to exhaust his claims by filing a Petition for Writ of Habeas
 13 Corpus in the California Supreme Court. However, California's procedural rules may bar Petitioner
 14 from obtaining a ruling on the merits of his claims in the California Supreme Court. Respondent
 15 reserves the right to argue the applicability of a procedural bar in state court. If Petitioner is
 16 procedurally barred from bringing the claims, Respondent may argue that those procedural rules bar
 17 subsequent federal habeas review of those claims as well as any statute of limitations issue that might
 18 arise. See *Coleman v. Thompson*, 501 U.S. 722, 729-35, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

19 Additionally, if Petitioner asks for a stay, this Court should not grant a stay unless he
 20 demonstrates good cause for failing to exhaust the claims before now. The stay procedure would be
 21 authorized only if "the Petitioner had good cause for his failure to exhaust, his unexhausted claims
 22 are potentially meritorious, and there is no indication that the petitioner has engaged in intentionally
 23 dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005).
 24 Respondent believes it would be difficult for Petitioner to show good cause for failing previously to
 25 raise these claims in the California Supreme Court because, inter alia, those claims were raised and
 26 addressed in California Court of Appeal case number D035782, the unpublished Opinion in that case
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1 was filed on January 8, 2002. (Lodgment 1.) Moreover, Petitioner cannot demonstrate that the claim
2 is potentially meritorious, as his current Petition is already untimely, as set forth under argument
3 heading I, above.

CONCLUSION

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5 For the foregoing reasons, Respondent respectfully requests that this Court deny the
6 Amended Petition with prejudice as untimely and deny any future request for a certificate of
7 appealability.

8 Dated: August 26, 2008

9 Respectfully submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: ***Gunn v. Salazar***

Case No.: **08-0972 LAB (WMC)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 26, 2008, I served the following documents: **MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Kevin O. Gunn
P-78894
Chuckawalla Valley State Prison
P.O. Box 2289
Blythe, CA 92226

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

Kevin O. Gunn
P-78894
Chuckawalla Valley State Prison
P.O. Box 2289
Blythe, CA 92226
Pro-Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 26, 2008, at San Diego, California.

L. Chavez
Declarant

Signature